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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GLEN F. MILLER,

Petitioner

v.

BOBBY L. PERSON and
UNITED STATES OF AMERICA,

Respondents

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SUMMARY OF THE ARGUMENT 1

ARGUMENT

I. Respondent Failed To Raise Any Plain Error Claim And, In Any Event, Petitioner's Motion For Acquittal Preserved The Point Challenging The District Court's Charge 4

II. The Prosecution Remained Tainted By Special Counsel's Control Prior To Appointment Of Government Counsel, And His Participation After Appointment Amounted to Control 6

III. Respondent's Claim That Bias Should Not Be Implied To Jurors Who Are Members Of A Large Diffuse Class Is Without Merit Under The Facts Of This Case 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases

Alabama v. Cox, 531 S.2d 71, cert. denied, 57 U.S.L.W. 3453 (1989) 8

Batson v. Kentucky, 476 U.S. 79 (1986) . . 8

Irvin v. Dowd, 366 U.S. 717 (1961) 9

Peters v. Kiff, 407 U.S. 493 (1972) . . . 9

Smith v. Phillips, 455 U.S. 209 (1982) . . 8

United States v. Jones, 580 F.2d 219 (6th Cir. 1978) 4, 5

United States v. Morgan, 581 F.2d 933 (C.A. D.C. 1978) 5

United States v. Ortiz, 422 U.S. 891 (1975) 5

Youakim v. Miller, 425 U.S. 231 (1976) . . 5

Young v. U. S. ex rel. Vuitton et Fils S.A., 107 S. Ct. 2124 (1987) 2, 6, 7

Rules

Federal Rules of Criminal Procedure, Rule 52 5

Supreme Court Rules, Rule 34(a) 5

Miscellaneous

Stern, Gressman & Shapiro, Supreme Court Practice (6th Ed. 1986) 5

Wright, Federal Practice and Procedure (1982) 5

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SUMMARY OF THE ARGUMENT

This case presents a setting in which the court of appeals committed three fundamental errors: First, the court of appeals implicitly overruled petitioner's Sixth Amendment and Rule 201(g) challenge to the trial court's charge that the jury was required to accept the existence of the injunctive order as a matter of law. Second,

the court of appeals misapplied this Court's decision in Young v. U. S. ex rel. Vuitton et Fils S.A., 107 S. Ct. 2124 (1987), where the district court authorized respondent's counsel in the underlying civil proceeding, rather than a disinterested attorney, to instigate and for a time remain in sole charge of the prosecution, and special counsel controlled the prosecution after appointment of government counsel. Third, the court of appeals refused to imply bias to jurors alerted during voir dire that they were class beneficiaries of the injunctive order and parties in the underlying civil litigation under Fed. R. Civ. P. 23(b)(2). Respondent endeavors to portray the facts in a false light and the issues as seemingly unimportant in an effort to dissuade this Court from addressing significant questions--questions involving petitioner's right to be prosecuted by a fair and impartial prosecutor and the right to a trial by an impartial jury--governing future decisions in this and other circuits.

Conceding that petitioner challenged the district court's authority to judicially notice the injunctive order and charge to the jury that it was required to accept that order as a matter of law, respondent nevertheless claims that trial counsel's failure to object to the instruction does not constitute plain error under Fed. R. Crim. P. 52(b) and that the jury could not possibly have found that the decree did not exist. Respondent conveniently overlooks the fact that it raised no plain error argument before the court of appeals and that trial counsel's motion for acquittal raising the absence of the injunctive order adequately preserved the point without the necessity of a formal objection to the district court's charge. While the jury's finding regarding the existence of the injunctive order may have been fait accompli, petitioner was nevertheless entitled to have the jury pass upon all facts judicially noticed, including the existence

of the injunctive order, consistent with his Sixth Amendment right to trial by jury and Fed. R. Evid. 201(g).

Relying upon the court of appeals' assumption that in the future district courts will refer contempt proceedings to the United States Attorney's Office before authorizing participation by private counsel, respondent claims that the fact scenario presented in the instant case will never reoccur. Respondent, like the court of appeals, totally ignores the fact that petitioner was entitled to be prosecuted by a disinterested and impartial prosecutor regardless of what may occur in the future and that all critical decisions incident to prosecution were made outside the presence of the trial court by special counsel before the district court's belated appointment of the United States Attorney just two weeks before the case was originally scheduled for trial. Furthermore, respondent's claim that the court of appeals correctly declined to evaluate special counsel's role in the prosecution after appointment of government counsel ignores the fact that the prosecution was already tainted by special counsel's control prior to appointment and that his participation after appointment amounted to control. Assuming arguendo that district courts will henceforth refer criminal contempt prosecutions to the United States Attorney's Office before authorizing participation by private counsel, the question when and under what circumstances assistance becomes control will nevertheless reoccur in every future case in which special counsel participates with disinterested counsel absent definitive guidelines articulated by this Court.

Finally, respondent claims that bias should not be implied to jurors who are members of a large, diffuse class and that the peculiar factual setting presented here will not reoccur in an

effort to dissuade this Court from granting certiorari. While there may be some instances in which parties in underlying civil litigation and class members in large, diffuse classes could sit fairly and impartially, bias should be implied in this instance in light of the disclosures made by the trial judge regarding the background of the case (App. 522, 524) and the remarks made by the United States Attorney asking jurors to vindicate their rights and the rights of other black citizens. (App. 657, 661.) The issue is whether petitioner was denied his right to a trial by an impartial jury and not whether the fact scenario presented here will reoccur.

ARGUMENT

I

RESPONDENT FAILED TO RAISE ANY PLAIN ERROR CLAIM AND, IN ANY EVENT, PETITIONER'S MOTION FOR ACQUITTAL PRESERVED THE POINT CHALLENGING THE DISTRICT COURT'S CHARGE.

Respondent urges for the first time on appeal that the trial court's failure to give a Rule 201(g) instruction did not constitute plain error and that the jury could not possibly have found that the decree did not exist. Respondent's claim is disingenuous and is intended to distract the Court's attention from the fact that the district court's charge denied petitioner his Sixth Amendment right to trial by jury on all essential elements of the crime charged and that Rule 201(g) clearly evidences congressional intent to preserve the jury's "traditional prerogative to ignore even uncontraverted facts in reaching a verdict." United States v. Jones, 580 F.2d 219,

224 (6th Cir. 1978). Moreover, respondent's plain error claim was never raised in the court of appeals and is not properly before this Court on certiorari.[1] See generally, Stern, Gressman & Shapiro, Supreme Court Practice at 364 (6th Ed. 1986). Significantly, the court of appeals did not hold that petitioner waived his Rule 201(g) claim by failing to object to the district court's charge. Respondent's ability to raise that question before this Court is foreclosed by the absence of any such holding. United States v. Ortiz, 422 U.S. 891, 898 (1975).

But to be sure, it was not incumbent upon trial counsel to object to the district court's charge. Trial counsel preserved the point by challenging the adequacy of the evidence regarding the existence of the injunctive order in his motion for acquittal. See generally, Wright, Federal Practice and Procedure, at 289 (1982). The instant case is, therefore, controlled by harmless error rather than the more stringent plain error doctrine. United States v. Morgan, 581 F.2d 933 (C.A. D.C. 1978).

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[1] Fed. R. Crim. P. 52 provides that errors not specified will be disregarded unless they affect the substantial rights of the parties, but that plain errors affecting substantial rights may be noticed even though they were not brought to the attention of the trial court. Similarly, this Court's Rule 34(a) provides that it may consider plain error evident from the record and otherwise within its jurisdiction to decide. While the court of appeals did not explicitly address the validity of the trial court's charge, this Court certainly has authority to address that issue and, at the very least, should remand the case to the court of appeals for consideration of that question. Cf. Youakim v. Miller, 425 U.S. 231 (1976).

II

THE PROSECUTION REMAINED TAINTED BY SPECIAL COUNSEL'S CONTROL PRIOR TO APPOINTMENT OF GOVERNMENT COUNSEL, AND HIS PARTICIPATION AFTER APPOINTMENT AMOUNTED TO CONTROL.

Respondent claims that the appointment of government counsel to control the criminal contempt prosecution removed any taint from the proceedings during the time special counsel remained in sole charge of the prosecution. That claim ignores the fact that all critical decisions incident to prosecution were made outside the presence of the trial court by special counsel before the district court's belated appointment of the United States Attorney just two weeks before the case was originally scheduled for trial. Those decisions included, inter alia, the determination of which persons would be the target of his investigation, what methods of investigation to use, what information would be sought as evidence, which persons should be charged with what offenses, whether any individuals should be granted immunity, and which persons should be utilized as witnesses. Young, supra, 107 S. Ct. at 2137. Since the record is devoid of any suggestion that those decisions were retracted after appointment of government counsel,[2] the

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[2] Special counsel's participation after appointment of government counsel gives rise to the inescapable conclusion that he never relinquished control. As the Court has already seen, special counsel took substantially more time in opening and closing arguments than did government counsel; he examined all fact witnesses and cross-examined every defense witness; and he responded to most of the objections and arguments at trial.

prosecution remained tainted through conclusion. Special counsel's participation from inception of the prosecution through appointment of the appropriate prosecuting authority and thereafter infected the proceeding with the "potential for private interests to influence the discharge of public duty," id. at 2136-2137 (emphasis in original), rendering harmless error analysis totally inappropriate under the facts of this case. Id. at 2141.

Respondent also claims that the court of appeals correctly declined to evaluate special counsel's role in the prosecution after appointment of government counsel. In doing so, respondent ignores this Court's suggestion in Young that an interested prosecutor's "familiarity may be put to use in assisting a disinterested prosecutor in pursuing the contempt action, but [does not] justify permitting counsel for the private party to be in control of the prosecution." 107 S. Ct. at 2137, n. 17 (emphasis in original). If that limitation is to have any meaning at all, then the court of appeals must not be permitted to place form over substance by reducing this Court's decision in Young to a mere formalistic inquiry into whether disinterested counsel was "officially appointed." The Court should accordingly seize this opportunity to articulate when and under what circumstances assistance becomes control in order to preserve the accused's right to be prosecuted by a fair and impartial prosecutor in every future case in which special counsel participates with government counsel.

III

RESPONDENT'S CLAIM THAT BIAS SHOULD NOT BE IMPLIED TO JURORS WHO ARE MEMBERS OF A LARGE, DIFFUSE CLASS IS WITHOUT MERIT UNDER THE FACTS OF THIS CASE.

Respondent claims that bias should not be implied to jurors who are members of a large, diffuse class in an effort to dissuade this Court from granting certiorari. While there may be some instances in which parties in underlying civil litigation and class members in large, diffuse classes could sit fairly and impartially, bias should be implied in this instance in light of the disclosures made by the trial judge regarding the background of the case (App. 522, 524) and the remarks made by the United States Attorney asking jurors to vindicate their rights and the rights of other black citizens.[3] (App. 657, 661.) Those comments were completely extraneous and unnecessary to the jury's understanding of the charges under the injunctive order, and they infected the proceeding with the probability of substantial bias. Smith v. Phillips, 455 U.S. 209, 229 (1982) (Marshall, J., dissenting).

Finally, respondent claims that the peculiar factual setting presented here will not reoccur. In making that claim, respondent ignores the fact that the right to a trial by an impartial jury lies

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[3] Respondent's reliance upon Batson v. Kentucky, 476 U.S. 79 (1986) is misplaced. Batson bars prosecutors from using peremptory challenges to exclude blacks from jury service solely on racial grounds. This Court recently rejected the opportunity to extend that ruling to defense counsel in Alabama v. Cox, 531 S. 2d 71, cert. denied, 57 U.S.L.W. 3453 (1989).

at the very heart of due process. Irvin v. Dowd, 366 U.S. 717, 721-722 (1961). As this Court observed in Peters v. Kiff, 407 U.S. 493 (1972), actual bias is virtually impossible to prove. It is necessary, therefore, to "decide on principle which side shall suffer the consequences of unavoidable uncertainty." Id. at 504. The issue is not whether the peculiar fact scenario presented here will result in any reoccurring problem as respondent suggests. Instead, the issue is whether petitioner was denied his right to a trial by an impartial jury. Petitioner asks this Court to imply bias to those jurors who were class beneficiaries of the injunction order and parties in the underlying civil litigation under the facts presented here and to preserve his right to trial by a fair and impartial jury.

CONCLUSION

The issues presented in this case present significant questions implicating the right to trial by an impartial jury and the right to be prosecuted by a fair and impartial prosecutor. The resolution of those issues will govern future decisions in this and other circuits. Petitioner accordingly asks this Court to grant the petition and to reverse the judgment of conviction for the reasons stated herein and those previously assigned.

Respectfully submitted,

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